

STATE OF MICHIGAN
COURT OF APPEALS

GARRETT W. ARNOLD, JR.,

Plaintiff-Appellant/Cross-Appellee,

v

JUDITH A. ARNOLD,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

July 13, 1999

No. 204984

Grand Traverse Circuit Court

LC No. 94-012913 DO

Before: Hoekstra, P.J., and Saad and R.B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right and defendant cross appeals from a divorce judgment, raising issues pertaining to the property division and alimony ordered by the trial court. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I

In a divorce case, the trial court makes findings of fact and dispositional rulings. *McDougal v McDougal*, 451 Mich 80, 87; 545 NW2d 357 (1996). On appeal, we uphold findings of fact unless they are clearly erroneous. *Id.* at 87. A finding of fact is clearly erroneous if we are left with a definite and firm conviction that a mistake was made. *Draggou v Draggou*, 223 Mich App 415, 429; 566 NW2d 642 (1997). We give special deference to the trial court's findings when they are based on the credibility of witnesses. *Id.* at 429. However, if a finding is based on an erroneous application of law to facts or may have been influenced by the trial court's incorrect view of the law, we are not limited to review for clear error. *Sparks v Sparks*, 440 Mich 141, 150 n 8; 485 NW2d 893 (1992). Further, a dispositional ruling should be upheld "unless the appellate court is left with the firm conviction that [it] is inequitable." *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993), quoting *Sparks, supra* at 152.

II

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

On appeal, plaintiff first argues that the trial court erred when it determined that various

assets were "separate property." Plaintiff argues that the trial court should have considered all of the parties' assets marital property. Alternatively, he argues that the trial court should have returned each party's premarital basis in any investment or asset and divided the remaining balance as marital property. We disagree.

Plaintiff does not challenge the trial court's findings of fact on specific assets, but rather attempts to show a broader error in the trial court's application of the relevant law. He argues that Michigan does not have a "comprehensive statutory scheme" for determining the disposition of alleged separate property and that the trial court had no good reason for claiming that such a scheme existed. However, this Court has regularly held that the disposition of property in a divorce case is controlled by statute. When dividing property in a divorce, the trial court first determines whether it is marital or separate property. *Reeves v Reeves*, 226 Mich App 490, 494-495; 575 NW2d 1 (1997). The trial court may divide all property that came "to each party by reason of the marriage." MCL 552.19; MSA 25.99; *Reeves, supra* at 494. However, the trial court can redistribute a party's separate estate when certain statutory exceptions are met. *Id.* at 495. One exception, MCL 552.401; MSA 25.136, is available when the other party "contributed to the acquisition, improvement, or accumulation of the property." The other exception, MCL 552.23; MSA 25.103, is available when "the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party." Michigan courts have construed the latter exception to mean that "invasion is allowed when one party demonstrates additional need." *Reeves, supra* at 495. Whether or not this "scheme" should be labeled comprehensive is arguable, but it is not material here. Hence, if there were some merit in plaintiff's argument, it provides no basis for relief.

Here, the trial court applied a multi-step approach in determining which property belonged to the marital estate. First, it determined if certain assets claimed by defendant were marital property or separate property. If the assets were separate property, the trial court then considered if plaintiff made a contribution deserving of compensation under MCL 552.401; MSA, 25.136. After determining that some of the disputed assets belonged to the marital estate, the trial court divided the marital estate between the parties. It then applied MCL 552.23; MSA 25.103 to plaintiff's request for alimony and awarded him alimony in gross to meet his proven additional need. The trial court denied plaintiff's request for periodic alimony.¹ We find this method to be in accord with *Reeves, supra*.

Therefore, we find that plaintiff's broader legal arguments (e.g., can Michigan's statutory scheme be called comprehensive; does the law provide sufficient guidance to trial courts; and the difficulty of classifying property as separate or marital property) provide no basis for disturbing the judgment. MCR 2.613(A). We also find no merit in plaintiff's legal claim that disclosure and consent are inherent requirements of finding separate property. Plaintiff's reliance on cases discussing criteria for enforcing an antenuptial agreement, *In re Benker Estate*, 416 Mich 681; 331 NW2d 193 (1982); *Rinvelt v Rinvelt*, 190 Mich App 372; 475 NW2d 478 (1991), is misplaced, because antenuptial agreements are based in contract. See e.g., *In re Hepinstall's Estate*, 323 Mich 322, 325-326; 35 NW2d 276 (1948). A basic requirement of contract formation is that there be a meeting of the minds on all material facts. *Kamalnath v Mercy Memorial Hosp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). Here, there is no antenuptial agreement; therefore, the trial court was obliged to operate under the

statutory scheme. The fact that the parties had a long marriage did not relieve the trial court of its obligation to determine if property should be deemed separate and, if so, the effect of the statutory exceptions. *Lee v Lee*, 191 Mich App 73, 78; 477 NW2d 429 (1991).

Plaintiff's broader legal arguments notwithstanding, the trial court's resolution of disputed issues for specific assets is a question that we must necessarily reach to decide this issue, and plaintiff has failed to address this question. Therefore, we conclude that he has not established any basis for appellate relief. *Roberts & Son Contracting, Inc v North Oakland Development Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). A party may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). See also *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

However, we find that the trial court erred when it determined that the anticipated costs of sale and its associated capital gains tax for the improved lot on the Neahtawanta Point property should be deducted in arriving at a "net appreciation" subject to division between the parties.² "[I]f in the opinion of the trial court the parties have presented evidence that causes the court to conclude that it would not be speculating in doing so, it may consider the effects of taxation, stock brokerage and realtor fees, and other inchoate expenses in distributing the assets." *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). See also *Carlson v Carlson*, 139 Mich App 299, 302; 362 NW2d 258 (1984) (equity in house did not include expenses of sale where the record indicated that the house did not have to be sold because it was awarded solely to one spouse and that spouse did not intend to move). Here, neither side presented evidence that a sale was planned or required. Therefore, whether treated as a factual finding affecting how much value was allocated to defendant as her separate asset, or as a dispositional ruling affecting the equitable distribution of assets allocated to the marital estate, we vacate the trial court's decision to deduct the anticipated costs of sale and associated capital gains tax because it was based on a speculated sale. See *Hanaway v Hanaway*, 208 Mich App 278, 300-301; 527 NW2d 792 (1995) and *Carlson v Carlson*, *supra* at 302. With this limited exception, we hold that the remaining arguments presented in plaintiff's first issue provide no basis for relief.

III

Plaintiff next argues that the trial court's chosen date for valuing the assets is inequitable. We disagree. Determining the proper date for assessing an asset's value falls within the trial court's discretion. *Nalevayko*, *supra* at 163. The trial court is in the best position to determine a proper date in light of all the circumstances. *Heike v Heike*, 198 Mich App 289, 292; 497 NW2d 220 (1993). Considering all the circumstances, we are not left with a firm conviction that the valuation date selected by the trial court is inequitable. *Sands*, *supra* at 34.

IV

Plaintiff next contends that the trial court's alimony award is inequitable. We disagree. We are not left with a firm conviction that the trial court's refusal to award periodic alimony, but to grant alimony in gross to plaintiff, is inequitable. *Sands*, *supra* at 34. The main objective of alimony is to balance the incomes and needs of the parties in a way that does not impoverish either party. *Magee v Magee*, 218

Mich App 158, 162; 553 NW2d 363 (1996). Although a party's ability to pay alimony is a relevant factor, *McCallister v McCallister*, 205 Mich App 84, 86; 517 NW2d 268 (1994), it is not inequitable to deny periodic alimony when one party has an ability to pay, but the party seeking alimony failed to prove his additional need.

V

Concerning defendant's cross-appeal, we agree that the trial court erred when it awarded plaintiff interest without considering how that award related to plaintiff's alimony in gross. However, we note that defendant does not argue that the trial court's award of interest is beyond its powers in equity. Defendant essentially argues that the trial court should have considered the interest award when it determined plaintiff's alimony in gross. Therefore, while we agree that the trial court erred, we decline to vacate the interest award entirely. Rather, we remand for a determination of defendant's alimony award in light of the interest award.

We distinguish the interest awarded to plaintiff from those situations where interest serves as an equitable remedy for overdue payments. Such a payment is proper when it prevents the delinquent party from realizing a windfall and assures prompt compliance with court orders. See *Reigle v Reigle*, 189 Mich App 386, 394; 474 NW2d 297 (1991) and *Ashbrenner v Ashbrenner*, 156 Mich App 373, 377; 401 NW2d 373 (1986). However, here, the interest award was directly related to the trial court's decision to use a valuation date close to the date the parties separated and the apparent consensus among the parties that the disputed assets appreciated substantially in the time since their separation. The trial court ordered defendant to pay interest on the cash or cash equivalent assets controlled by her during the litigation but ultimately awarded to plaintiff.

We conclude that the interest award appropriately serves the goal of an equitable division of marital assets up to the end of the marriage. See *Reeves, supra* at 493 (a court must strive for an equitable division of increases in marital assets between the beginning and end of a marriage). However, we agree with defendant that the trial court should have considered the interest award when determining alimony in gross to reach the amount of plaintiff's proven needs. The interest awarded on those cash and cash equivalent assets should have been considered, for purposes of reaching that amount, because it affected the equitable division of the marital estate and was itself payable in cash. To hold otherwise would give plaintiff a windfall by allowing him to receive alimony in gross in excess of his proven additional need.

For this reason, we conclude that the trial court erred when it failed to consider the interest awarded to plaintiff when calculating his alimony in gross. Therefore, we remand to the trial court for a redetermination of alimony in gross. In determining the alimony in gross, the trial court should also consider any impact that a correction for the error established by plaintiff relative to the Neahtawanta Point property will have on alimony in gross and interest.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Henry William Saad

/s/ Robert B. Burns

¹ Alimony in gross is "a sum certain and is payable in one lump sum or in periodic payments of a definite amount over a period of time." *Bonfiglio v Pring*, 202 Mich App 61, 63; 507 NW2d 759 (1993). It is not modifiable absent fraud. *Id.* at 63. By contrast, periodic alimony is modifiable based on a change of circumstances. *Id.* at 63.

² Although plaintiff labels his argument as pertaining to "valuation," we note that there was no dispute in the proceedings below that the improved portion of the Neahtawanta Point property had a value of \$385,000. The question before us concerns the trial court's findings as to how much of that value should be subjected to an equitable division between the parties.